No. 736

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In The

Supreme Court of the United States

Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, both deceased.

Plaintiffs and Appellants,

vs

Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah,

Defendants and Respondents.

PETITION FOR APPEAL BY APPELLANTS FROM A DECISION OF THE SUPREME COURT OF THE STATE OF UTAH, TO THE SUPREME COURT OF THE UNITED STATES, and APPEAL ON THE MERITS OF ERROR, and APPEAL ON THE QUESTION OF JURISDICTION, and CERTIORARI TO REVIEW DECISION OF THE SUPREME COURT OF THE STATE OF UTAH

APPEALED FROM

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Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, deceased.

Plaintiffs and Appellants,

vs

Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah,

Defendants and Respondents.

No. 6248

APPELLANTS PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF THE STATE OF UTAH.

PETITION OF APPELLANTS

To the Chief Justice of the Supreme Court of the State of Utah.

Your petitioners, Laura Morris, Special Administratrix of the estate of Washington Pocatello, and Minnie Pocatello, husband and wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Race-

horse, Josephine Pocatello and Ray Pocatello, heirs of Washington Pocatello and Minnie Pocatello, respectfully shows:

Your Petitioners are the appellants in the above entitled cause;

That this action was first filed in the District Court of the First Judicial District of the State of Utah, in and for the County of Box Elder by the above named heirs of Washington Pocatello and Minnie Pocatello as plaintiffs in their own name to quiet title in them to an undivided one-third interest in the E 1/2 of S. E. 1/4 of Section-12. T. 11 N. R 3 W. S. L. M., in Box Elder County, Utah and an accounting of the rents and profits of said undivided one-third interest, against U. F. Diteman, A. I. Grover and Hortense Grover, his wife and Amasa L. Clark, Joseph E. Robinson and Box Elder County, Utah. The only defendants that ever appeared, and pleaded in the said action, is the respondents, Amasa L. Clark and Joseph E. Robinson, who appeared and filed a demurred to the Original Complaint. One of the grounds for demurrer was that the heirs did not have capacity to sue for an accounting for the rents and profits, the complaint and the record showing that an Administrator had been appointed for the estate of Washington Pocatello, deceased, and that said estate was never settled and closed, and the administrator discharged. The Trial Court sustained the demurrer on that ground, and granted time to file an amended complaint. A second amended complaint was filed stating only one cause of action for quieting title and accounting of rents and profits.

Respondents Amasa L. Clark and Joseph E. Robinson again appeared and demurred to the complaint, one of the grounds of demurring being that two causes of action were improperly joined, one for quieting title, and one for accounting of the rents and profits. The Trial Court sustained respondents demurrer on that ground, then a third amended complaint was filed, stating two causes of action, one for quieting title in the heirs of Washington Pocatello, deceased, to the undivided one-third interest, in the E 1/2 of the S. E. 1/4 of Sec. 12, T. 11 N. R. 3 W. S. L. M., in Box Elder County, Utah, and a second cause of action for an accounting of the rents and profits, of said undivided one-third interest, commencing with the year 1925, the same being the first year that the respondents Amasa L. Clark and Joseph E. Robinson, claimed ownership to the said undivided one-third interest, of said 80 acres of land. Said Third Amended Complaint, pleaded verbatim the decrees of distribution, of the Judge of the said District Court made on the 7th day of November 1919, in the estate of Yaotes Owa, decreeing an undivided one-third interest in and to the E1/2 of S. E.1/4 of Sec. 12 T. 11 N.R. 3 W.S.L.M., to the estate of Washington Pocatello, deceased. Also the third amended complaint pleaded verbatim, another decree made on the same day by the same District Court Judge, in the estate of James Brown, and Jane Brown, decreeing on undivided one-third interest in the very same identical 80 acres of land, to the estate of Washington Pocatello, deceased; the said third amended complaint alleging that the plaintiffs, Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Poca-

tello, were Indians residing on the Fort Hall Indian Reservation, in Idaho, wards of the Government, and that they were the only heirs at law of Washington Pocatello, and his wife Minnie Pocatello, both deceased, and that Washington Pocatello, was at all times mentioned in the complaint and at the time of his death,-which occured on the 27th day of April, 1917-, an Indian, and a ward of the United States Government. That said Third Amended Complaint also pleaded that on February the 2d, 1917, a short time prior to the death of Washington Pocatello, one Albert Saylor, believing that Washington Pocatello was the only heir entitled to inherit all of the said heretofore described 80 acres of land, secured a warranty deed from Washington Pocatello, and Minnie Pocatello, his wife, to one U F. Diteman for the entire 80 acres for the agreed price of $3200.00 payable $200.00 cash, and the balance of $3000.00 payable $300. each year on the 20th day of December, the last payment to be made on the 20th day of December, 1926, and that the said deed, was placed in escrow with the First National Bank of the City of Pocatello, Idaho; that the terms of the escrow agreement was plainly written on the envelope that contained the deed, and it was also alleged that the Cashier of the First National Bank, of Pocatello, Idaho, made and executed a sworn affidavit, setting forth the terms of the escrow, that said affidavit was dated, April 18th, 1917 and was filed of record in the County Records of Box Elder County, Utah, on the 19th day of April, 1917. The said complaint setting forth the affidavit verbatim. That said complaint alleged that said deed was secured from Washington Pocatello long before any interest in the

property had been decreed to Washington Pocatello; that said complaint alleged that U. F. Diteman and one A. I. Grover, almost immediately after the judge of the District Court of Box Elder County, Utah decreed the undivided one-third interest in the said 80 acres of land to the estate of Washington Pocatello, deceased, paid, or caused to be paid, into the First National Bank of Pocatello, Idaho, the escrow holder, only one thousand dollars of the agreed balance of $3000, set forth in the escrow agreement to be paid before the delivery of the deed could be made, and that the First National Bank of Pocatello, Idaho, the depositary, some 17 months after Washington Pocatello had died, wrongfully, unlawfully and illegally delivered the deed to U. F. Diteman or A. I. Grover, who did on the 10th day of November, 1919, illegally place the said deed executed by Washington Pocatello and Minnie Pocatello, of record in the County Records, of Box Elder County, Utah, and took possession of and claimed ownership of said undivided one-third interest in said described 80 acres of land. The property of the estate of Washington Pocatello, deceased. The said complaint alleging that the deed of Washington Pocatello and Minnie Pocatello was wrongfully delivered by the escrow holders, and wrongfully secured and filed of record by U. F. Diteman or A. I. Grover, and was void and of no effect, and passed no title to the said undivided one-third interest. The complaint further alleging that A. I. Grover and his wife Hortense Grover did on the 12th day of March, 1925, convey all of the said 80 acres of land to the defendants Amasa L. Clark, and Joseph E. Robinson, and that since March 12th, 1925, the said two defendants, exercised control and management, and claimed

ownership to the said undivided one-third interest; that it was alleged in said complaint that A. I. Grover had no title to said undivided one-third interest, and he passed no title to defendants to the undivided one-third interest; it was alleged in the complaint that the physical condition and value of the 80 acres of land had not changed in any material respect since the day of the decrees of distribution until the time of filing this suit.

The second cause of action was for an accounting of the rents and profits from said undivided one-third interest. We believe that is all the facts of the Third Amended Complaint that is necessary to set forth.

To this complaint the defendants and respondents again demurred, the court overruled their demurrer. The respondents answered, admitting that Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Pocatello were the only heirs of law of Washington Pocatello and Minnie Pocatello, deceased; admitted they were Indians, wards of the Government, living on the Fort Hall Reservation in Idaho. By paragraph six of the answer respondents admitted all of paragraph six of the complaint thereby admitting that the District Court of Box Elder County, did on the 7th day of November, make and enter the two decrees of distribution, decreeing an undivided one-third interest in the estate of Washington Pocatello, deceased, and that true copies of said decrees were made a part o fthe complaint, marked Exhibits "C" and "D" respectively.

In paragraph eight of the answer, respondent admitted that the affidavit of the Cashier of the First National Bank of Pocatello, Idaho, the escrow holder, dated, April 18, 1917, describing the terms of the escrow was filed of record on April 19, 1917, and that a true copy of said instrument was set out correctly in paragraph 8 of the complaint.

Appellants alleged in paragraph 18 of the complaint that one Charles E. Foxley was appointed administrator of the estate of Washington Pocatello, deceased, and that the said administrator reported that he had received $995 from the Escrow Holder for the estate of Washington Pocatello, deceased, and respondents in paragraph 18 o ftheir answer admit that Charles E. Foxley, was appointed administrator of the estate of Washington Pocatello, deceased and that said probate proceedings were still pending and admitted that Charles E. Foxley reported certain cash from the sale of said premises as being an asset of the Estate of said Washington Pocatello, deceased. Respondents filed a separate defense to appellants complaint, and alleged among other matters that the defendants were owners in fee simple of the said premises, and among other matters alleged as a defense in paragraph 27 of their answer, at folio (0233) of the Abstract of Record, as follows:

> "That the First National Bank of Pocatello, Idaho, is insolvent, has been liquidated and that defendants can obtain no records from said Bank relating to the alleged escrow agreement; that if said First National Bank of Pocatello, Idaho, Escrow Holder, made an unauthorized delivery of

> said deed, then the Administrator of the said Washington Pocatello Estate and the Heirs of said Estate, by their subsequent acts, waived the performance of the conditions and ratified said delivery and by said subsequent acts raised a presumption of ratification of said delivery and are estopped to deny the validity of said delivery."

Appellants contended that was an admission by respondents that the Bank made an unlawful delivery of the deed, but the heirs of Washington Pocatello were estopped to deny the validity of the deed, by their action, and the action of the administrator placing the burden upon the defendants to prove the ratification by the Administrator, and the heirs of the estate of Washington Pocatello, deceased, or a valid delivery of the deed.

That respondents prayed for affirmative relief, that a Decree of the Court, be entered declaring respondents to be the owners seized in fee of said premises and that title thereto be quited in them to the undivided one-third interest, which also placed the burden upon the respondents to prove they had good title.

In all actions to quiet title, each litigant must prove his own title, and cannot rely on the weakness of the other litigant's title. It was also admitted by the respondents that the Deed of Washington Pocatello and Minnie Pocatello, was placed in Escrow not to be delivered until the full performance of the terms of the escrow was fulfilled. Therefore the burden was on the defendants to prove that the full purchase

price mentioned in said terms were paid to the Escrow Holder before he delivered the deed to the grantee or anyone for the grantee.

On these pleadings the case went to trial before the trial court of the First Judicial District of Utah, in and for Box Elder County. Certified copies of the Decrees of Distribution, distributing an undivided one-third interest in the 80 acres to the Estate of Washington Pocatello, deceased was admitted in evidence, and the District Court Record and File, in the Case of the Estate of Washington Pocatello, deceased, was admitted in evidence, which shows the Administrator filed no Inventory at all in the Estate of Washington Pocatello, deceased, but which file contains a Final Account and Petition, for Settlement, in the matter of the Estate of Washington Pocatello, deceased, showing that Charles E. Foxley, the Administrator of the Estate of Washington Pocatello, deceased, hereby renders and presents for settlement, his Account of the Administration of said estate for and including the period of time beginning from date of appointment- and ending on the 3rd day of March, A. D. 1921, as follows:

Cash Account

(a) Showing all Receipts, during the period of time above mentioned, of Moneys belonging to said Estate.

Month, January. Of whom Received. First Nat'l Bank of Pocatello, Idaho. On or for what. Land contract of sale by deceased and wife. $995.00.

Brief Description of Property was given as follows:

> "The property described in the petition for letters and described as an undivided one-third interest in the estate of Yaotes Owa, or one-third of the East 1/2 of the S. E. 1/4 of Section, 12, Tp. 11 N. R. 3 West, S. L. M., had been converted into cash by reason of a contract executed by Washington Pocatello and wife prior to the death of Washington Pocatello, and placed in escrow and covering such interest as might be determined as belonging to said Washington Pocatello."

The said Petition for Accounting, filed in the District Court of Box Elder County, in the Matter of the Estate of Washington Pocatello, deceased, by the Administrator of said Estate contains a prayer as follows:

> "Wherefore petitioner prays that this account be allowed and settled. Dated March 3, 1921."

At the same time the Administrator of the Estate of Washington Pocatello, deceased, in the Matter of said Estate, filed in the District Court of Box Elder County, a petition for distribution of the estate of Washington Pocatello, deceased, and petitioned said District Court for a hearing on said account and petition for distribution; that the District Court of Box Elder County never to this day has held any such hearing, the Judge of said Court set different dates for such hearing, the last date set for such hearing being the 13th day of February, 1922, no hearing was held on that date, and nothing

further was ever done by the District Court of Box Elder County, Utah, in the Matter of the Estate of Washington Pocatello, until this suit to Quiet Title, and for an accounting of rents and profits was filed.

The Probate File in the Matter of the Estate of Washington Pocatello, deceased, No. 355, and all the records and papers filed in said matter, is a part of, and pertains to the case at bar, and were all admitted in evidence, and they are so closely associated with and a part of this case, that the Court should take judicial notice of all that was done by the District Court in the Estate of Washington Pocatello, deceased. The Decrees of Distribution, in both the Estate of Yaotes Owa, and James Brown and Jane Brown, distributed the undivided one-third interest, to the Estate of Washington Pocatello, deceased, not to Washington Pocatello individually, and the District Court of Box Elder County, Utah, assumed jurisdiction over the estate of Washington Pocatello, deceased, and on the 12th day of January, 1920 issued letters of administration to one Charles E. Foxley, who duly qualified, and the record shows and it is admitted that administration of the Estate of Washington Pocatello, deceased, has not to this day been closed.

Subsequent to hearing and the taking of testimony in the case at bar by the Trial Court, and arguments by counsel and the submitting of Briefs the Trial Court, made its Memorandum Decision as follows:

Memorandum Decision.

Brigham, Utah

In Open Court October 23rd, 1939.

The Court: In the case of Laura Morris, Special Administratrix, vs Clark and Robinson, the Court directs that findings and decree be prepared in favor of the defendants and against the plaintiffs, for the reason that the court is not convinced from the record here but what the full amount of the escrow had been paid by Sailor or Diteman, or some of the parties in interest, and for the further reason that it affirmatively appears that during the minority of those Indians an administrator was acting, or supposed to be acting, in this jurisdiction, a fact which these Indians knew about for the reason that they went to the Superintendent at Fort Hall and requested certain things to be done; and it is my understanding that the statute of limitations will run against a minor during the time that the personal representative is acting. So far as the question of notice is concerned, the mere fact that Mr. Service made an affidavit showing terms of the escrow cannot be held to mean anything in view of the fact that the very deed referred to in the escrow appears to have been subsequently recorded showing a consideration of $3200. Nor does the affidavit of Grover, as shown in the abstract, give notice of any irregularity. So the findings may show that the defendants were, in effect, innocent purchasers for value.

Now, in view of the fact that I did not fix a date for rendering a decision in this matter, I will ask the reporter to make a transcript of this decision, and counsel for defendants is requested to prepare and present to this court not later than November 27th, 1939, after notice on counsel for plaintiff, proposed findings, conclusions of law and decree.

Counsel for defendants prepared and presented to the Court 30 Findings of Fact, which space and time will not permit to enter all of the same in this petition. And we will refer only to the first 13. (See trans. ff 0315 to 0319).

Finding I

That Laura Morris was legally appointed Special Administratrix of the Estate of Washington Pocatello, deceased. etc.

Finding II

That the plaintiffs Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello are the sole surviving heirs of Washington Pocatello and Minnie Pocatello, both deceased; that at all times mentioned herein they were and now are full blooded Indians, members of Western Soshono Tribe of Indians and at all times herein mentioned were, and now are wards of the United States Government, residing on the Fort Hall Indian Reservation in Idaho; that all said plaintiffs are over the age of twenty-one years and all of said plaintiffs joined in said action with

full knowledge and permission of the Superintendent of the Fort Hall Indian Agency of the United States Department of Interior, Office of Indian Affairs, of Fort Hall Indian Reservation, Fort Hall, Idaho.

Finding III

That Washington Pocatello, died on or about the 27th day of April, 1917, at Fort Hall, Idaho; that during his lifetime and at the time of his death he was the only heir by blood, of an Indian woman of the name of Yaotes Owa, and also of a daughter of Yaotes Owa, commonly called Jane; that Minnie Pocatello his wife died at Fort Hall, Idaho on or about the 28th day of May, 1928. etc.

Finding IV

That Yaotes Owa died in the late 80's that at the time of her death she was the owner of a certain tract of land, (describing it). That besides Washington Pocatello, Yaotes Owa left a daughter known as Jane who died in the late 90's without issue, but leaving as surviving her a husband named James Brown, and Washington Pocatello, a descendent by the half blood. etc.

Finding V

That no probate proceedings were held on either estate until 1917. etc.

Finding VI

That on the 7th day of November, 1919, that Justin D. Call made and entered two decrees determining heirship, and of distribution, one in the estate of Yaotes Owa, and one in the estate of Jane Brown and James Brown, in each decree of Distribution there was decreed an undivided two-thirds interest to James S. Brown, the son of James Brown, the husband of the widow woman Jane, the daughter of Yaotes Owa, and an undivided one-third interest to the estate of Washington Pocatello, deceased, each decree describing the same 80 acres of land located in Box Elder County, Utah described as follows, to-wit:

> The E 1/2 of the S. E. 1/4 of Section 12. Township 11, North, of Range 3 West, Salt Lake Meridian.

That a copy of the Decree in the estate of Yaotes Owa was filed for record by the Administrator on the 8th day of November, 1919, as recorded in Book H. Misc. Records at Page 319, of the records of Box Elder County, Utah, that a true and exact copy of said decree is attached to and made a part of plaintiffs complaint marked, exhibit "C"; that a copy of the Decree made and entered in the estate of Jane Brown and James Brown was by the administrator filed for record on the 8th day of November, 1919, and recorded in Book H. Misc. Records at Page 320 of the Records of Box Elder County, Utah, that a true and exact copy of this

Decree it attached to plaintiffs complaint marked Plaintiff's Exhibit "D", and made a part thereof.

Finding VII

That at the time said Decrees were made and entered, the said 80 acres of land were in fair state of cultivation but had no water right thereof, and the land was uneven and had an appraised value of $4900.00; that by said decrees of distribution James S. Brown claimed an undivided two-thirds interest in said land and the estate of Washington Pocatello, deceased, claimed to be the owner of an undivided one-third interest in said lands; that the said James S. Brown sold his undivided two-thirds interest in said premises to the predecesors in interest of one Albert I. Grover, and Washington Pocatello and Minnie Pocatello, in their lifetime made, executed and delivered in escrow a Warranty Deed for their undivided one third interest and that the said Albert I. Grover in November, 1919, by msene conveyances, became the owner of said premises and at said time entered into the possession of said property and thereafter until March, 1925, when the defendants herein became the possessors of said property, farmed said premises and collected all the rents and profits from said premises and paid no part of said rents or profits to the Administrator of the estate of Washington Pocatello and Minnie Pocatello, his wife, or to any of the heirs of said estate.

Finding VIII

That on or about February 2d, 1917, Washington Pocatello and Minnie Pocatello, his wife, entered into a contract to sell said eighty acres of land to one U. F. Diteman for a consideration of $3200.00 payable $300.00 cash, the balance of the purchase price to be paid in annual installments of $300.00 payable on the 20th day of December of each year until the full sum of $3200.00 was paid, the last installment falling due on the 20th day of December 1926; that said Washington Pocatello and Minnie Pocatello, his wife as sole heirs of Yaotes Owa, made, executed and delivered a Warranty Deed for said eighty acres of land to U. F. Diteman, which said Deed recited a consideration of $3200.00 and was deposited with the First National Bank of Pocatello, Idaho, as Escrow Depositary, the said Bank to hold said Warranty Deed until the consideration of $3200.00 was fully paid, at which time said Deed so left in escrow was to be delivered by said Bank to said U. F. Diteman; that the terms of said escrow agreement were written on the envelope containing the escrow papers; that an affidavit made at the time by the Cashier of said Bank was filed of Record in the County Recorders Office of Box Elder County, Utah, which said affidavit was in words and figures following:

Kind of Instrument: Affidavit. Date of Inst.: April 18, 1917. Recorded April 19, 1917, at 2:50 P. M. in F. of Misc., Page 613.

State of Idaho
County of Bannock. } ss.

W. D. Service, who being first duly sworn on oath says; That on the 1st day of January, 1917, he was, and ever since has been and now is the Cashier of the First National Bank of Pocatello, Idaho; that on the 2d day of February, 1917, Washington Pocatello and Minnie Pocatello, his wife, executed and placed in escrow with the First National Bank of Pocatello, Idaho, their deed conveying to U. F. Diteman of Seattle, Washington, the E 1/2 of the N E 1/4 of Section 12. T. 11. N. R. 3 W. SLM in Box Elder County Utah; that the said deed is now in the possession of the First National Bank of Pocatello, Idaho, and to be delivered to the said U. F. Diteman when all the following payments have been made at the said bank for and in behalf of the said Washington Pocatello, to-wit: $300.00 on December 20, 1917, and $300.00 on December 20, of each and every year thereafter up to and including December 20, 1926.

W. D. SERVICE,

Subscribed and sworn to before me this 18th day of April, 1917. Paul M. Bryan, Notary Public, Residence, Pocatello, Idaho. (Seal).

That said Escrow Agreement was entered into before Washington Pocatello had acquired any title to the premises through Probate Proceedings

and that said Washington Pocatello had never occupied said land.

Finding IX

That the plaintiffs offered no evidence at the trial of said cause to the effect that U .F. Diteman, Grantee in said Warranty Deed on escrow with the First National Bank of Pocatello, Idaho, himself or with one A. I. Grover, wrongfully, unlawfully, corruptedly and intentionally, with intent to defraud the Estate of Washington Pocatello and the heirs of the estate of Washington Pocatello, paid to the said Escrow Holder only $1000.00 on the purchase price of $3200.00 named in said Deed and Escrow Agreement and wrongfully and unlawfully procured from said depositary the said Warranty Deed; that said plaintiffs offered no testimony to the effect that said depositary did, unlawfully, wrongfully and contrary to the express terms and obligations of said Escrow Agreement, accept $1000.00 and deliver to said U. F. Diteman and A. I. Grover the said Deed; that the plaintiff's offered no testimony that at the time of the delivery of said Deed the said U. F. Diteman and said depositary Bank, all had knowledge that Washington Pocatello was dead for more than a year previous to the delivery of said Deed and that no administrator had been appointed for said estate and that by reason of the failure to offer evidence on said points heretofore set out in this paragraph, the Court finds against the same; the Court further finds that said Warranty Deed was by the First

National Bank of Pocatello, Idaho, delivered to U. F. Diteman, or some person acting for him, and the said deed which on its fact recited a consideration of $3200,00, was regular filed for record in the office of the County Recorder of Box Elder County, Utah, on November 10th, 1919 at 4:00 P. M. in Book 15 of Deeds at page 440; that said U. F. Diteman and A. I. Grover, or either of them, did not unlawfully, illegally or for the purpose of cheating or defrauding the Estate of Washington Pocatello and his heirs out of said property, file the said deed for record in said Box Elder County, Utah, but said deed was regularly filed of record and recorded; that the said A. I. Grover, by the recording of said Deed, did not attempt to take from the estate a valuable property right; that the said A. I. Grover did from November, 1919, claim ownership of said lands; that said Deed was not void but was a valid Deed and passed title to the undivided interest of said property to U. F. Diteman; that the depositary bank had no right to deliver the deed to said property without full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of $3200.00 and from the evidence in the case the Court finds that said $3200.00 recited in the Deed was paid to said Escrow Holder and that the transaction with said Bank was not fraudlent; the court further finds that although Washington Pocatello had no title before the property was decreed to his estate, that it was unnecessary to specifically enforce the Escrow Agreement under

the provisions of Section 7741 Revised Statutes of Utah, but the Bank upon payment of the consideration aforesaid, was justified in delivering said Deed to the grantee therein.

Finding X

That A .I. Grover on or about the 3d day of November, 1919, secured from U. F. Diteman and Josie Diteman, his wife, Quitclaim Deed for said eighty acres of land to himself which said Deed was recorded on or about the 11th day of November, 1919, in Book 15 of Deeds, at page 442, in the Recorder's Office of Box Elder County, Utah; that said A. I. Grover did not have knowledge that his grantors in said Quitclaim Deed had no legal title to the undivided one-third interest in said property; that said A. I. Grover did not unlawfully and wrongfully file said Deed for Record and did not admit that it was obtained without full compliance with the obligations of the Escrow agreement; that said A. I. Grover did cause his Affidavit to be filed on or about February 10th, 1920, and that a true and correct copy of said Affidavit is marked "Exhibit E" and attached to plaintiff's complaint and that as to said Affidavit the same was regularly made in connection with the making of a loan by said A. I. Grover from the State Land Board of Utah for $7500.00.

Finding XI

That the said A. I. Grover did not fraudlent obtain the said Washington Pocatello Deed and file

it for record; that after procuring the deeds for said premises in November, 1919, the said A. I. Grover took over said premises, farmed the same and thereafter collected all the rents and profits of said property; that said A. I. Grover did not account to the Estate of Washington Pocatello, or the plaintiffs herein, for rentals or otherwise, as the said A. I. Grover did not know that the Estate of Washington Pocatello, deceased, and the heirs of the estate claimed or owned an undivided one-third interest in the premises and that he was fraudlently cheating or attempting to cheat the heirs of said estate out of said interest; that from November, 1919, to March, 1925, during which period the Court finds A. I. Grover had control of the property, he was not an owner in common with the heirs of the estate of Washington Pocatello and did not collect the rents as a co-tenant with the heirs of the estate of Washington Pocatello and did not hold the same under a constructive trust for said heirs, but held and owned said premises in fee simple.

Finding XII

That on the 12th day of March, 1925, the said A. I. Grover, also known as Albert I. Grover, and Hortense Grover, his wife, conveyed by Warranty Deed all of their right, title and interest in and to the said eighty acres of land to the defendants, Amasa L. Clark and Joseph E. Robinson, and the said named defendants have since March 12th, 1925, exercised control and possession of all of

said premises and ever since said date have claimed and now claim ownership to the said undivided one-third interest in said property against the heirs of the Estate of Washington Pocatello, deceased and the administrator of said estate; the said defendants have, since the 12th day of March, 1925, collected all of the rents and profits of said land and have made no accounting for the same by reason of the fact that said defendants claim and own said premises; that said defendants and their immediate predecessor in interests, A. I. Grover, have at all times since November, 1919, been in the actual possession of said premises and the plaintiffs, or any of them, have not been seized or possessed of said property at any time since said last named date.

Finding XIII

That the defendants, Amasa L. Clark and Joseph E. Robinson were innocent purchasers for value, by Deed, from Albert I. Grover and Hortense Grover, his wife, dated on or about March 12th, 1925, that at the time said defendants purchased said premises they believed that A. I. Grover was the owner in fee of said premises and knew of no claim that A. I. Grover had fraudlently and wrongfully obtained the said Deed from said Bank as claimed by the plaintiffs herein and without the payment of the consideration recited in said Deed; that defendants did not know the Quitclaim Deed from U. F. Diteman and wife to A. I. Glover conveyed no title to said undivided one-third inter-

est; that said defendants had no knowledge or notice of any fraudulent acts of A. I. Grover and/or U. F. Diteman; that they did not connive and conspire in obtaining the said Deed and filing the same for record without paying any just consideration for the same that they did not know that the said undivided one-third interest had not been properly probated or legally transfered from the estate of Washington Pocatello, that defendants did not know that their grantor, A. I. Grover was at all times an owner only of an undivided two-thirds interest in said property and did not know that said Grover had the same in common with the heirs of the Estate of Washington Pocatello as to an undivided one-third interest; that these defendants did pay a consideration for said premises upon purchasing the same from A. I. Grover and wife, to-wit: the sum of $12,500.00 for the premises in their improved condition with water rights therefore; that the defendants by said mense conveyances obtained fee simple title to said premises and that the plaintiffs herein do not own an undivided one-third interest in said premises or any interests whatsoever; that the defendants since March 1925 have collected the rents and profits from said premises, but do not hold the same as co-tenants with the heirs of Washington Pocatello, under a constructive trust or otherwise, except as owners thereof.

There are 17 other findings some long and exhaustive Findings made by the Trial Court, however, Ap-

pellants believe the 13 findings hereinbefore quoted are sufficient to establish one of the Federal questions involved in this suit, that is the validity of a Statute of the United States hereinafter quoted.

Following the Findings of Fact the Trial Court made its conclusions of law. 1. That a Decree be entered dismissing Plaintiff's First cause of Action with predjudice; 2. That a Decree should be entered dismissing Plaintiff's Second cause of action as against the defendants herein. 3. That a decree should be entered that the defendants, Amasa L. Clark and Joseph E. Robinson, are the owners in fee simple title of the premises described in paragraph 23 of the Findings of Fact herein, and that decree be entered quieting title in said defendants thereto. 4. That said defendants are entitled to their cost of action. Let judgment be prepared accordingly. Dated 27th day of November, 1939, signed Lewis Jones, District Judge.

That a decree was made and entered by the Trial Court as follows:

> Now therefore, in conference with the said Findings of Fact and Conclusions of Law, it is by the Court hereby Adjudged
>
> 1. That plaintiff's or either of them, have no estate, right, or title, interest, claim or demand of any nature or description, or right of possession, in or to the real property, hereafter described, or any part thereof, and that the plaintiff's complaint as to the first cause of action be, and the same is

hereby dismissed with prejudice as against Amasa L. Clark and Joseph E. Robinson.

2. That the defendants Amasa L. Clark and Joseph E. Robinson are the owners in fee simple absolute and in the possession and entitled to the possession of the following described real property situated in Box Elder County, State of Utah, to-wit:

> The E 1/2 of the S E 1/4 of Section 12, Township 11 North, Range 3 West, Salt Lake Meridian.

3. That the plaintiffs herein, and each of them, and all persons claiming under them, or any of them, be perpetually restrained and rejoined from setting up or making any claim to or upon the real property herein above described, or any part thereof, and the title of the defendants herein, Amasa L. Clark and Joseph E. Robinson, to said property is hereby quieted against all claims, demands or pretentions of the plaintiffs herein, or any of them, and of all persons claiming under them, or either of them.

4. That the plaintiffs second cause of action be, and the same is hereby dismissed.

5. That defendants recover costs herein taxed the sum of $4.30.

And judgment is hereby entered accordingly.

Dated this 27th day of November, 1939.

Lewis Jones,
District Judge.

Filed November 27th, 1941.

The first Federal question involved in the case is the Construction of the United States Statute, enacted by the United States Congress on June the 30th, 1834; enacted for the protection of Indians, that in all trials for the right of property in which an Indian may be a party on one side, and a white person on the other, that the burden of proof is upon the white person, if the Indian only makes out a presumption of title, which United States Statute reads as follows:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof rests upon the white person whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."
>
> Act of Congress, June 30, 1934, Sec. 22 of Act; c. 161, Sec 22, 4 Stat. 733 R. S. Sec. 2126; U. S. Code, Compact Edition, Sec. 194. United States Code Annotated Vol 25, Sec 194.

The policy and purpose of this United States Statute was to protect the Indians in their right of property, and the said Statute has the same force and effect today as it had the day it was enacted.

"Policy evidence by the Statute:

This section is evidence of the policy of the government to give Indians the benefit of the doubt on questions of fact or construction of treaties or statutes relating to their welfare." (1925) 34 O. Atty. Gen. 139.

Appellants called the attention of the Trial Court to this United States Statute, in the argument of counsel, and in appellants brief to said court by copying the Statute verbatim, and giving the proper citations telling the Court where the true text of the Statute could be found.

In the case at bar, the Trial Court by its findings did not alone deny to these Indians the rights and privileges of the Federal Statutes, but in violation of said Statute, heaped burdens of proof on the Indians that is contrary to the universal weight of legal authority, to place upon a white person litigant in a suit of this kind.

In the case at bar, it was admitted by defendants and found by the Trial Court that Appellants were Indians, Wards of the Government, living on the Fort Hall Indian Reservation, in Idaho, that the District Court of Box Elder County, Utah, did make two Decrees of Distribution to the Estate of Washington Pocatello, of the undivided one-third of the 80 acres in question,-which created the highest muniment of title in the heirs of the Estate of Washington Pocatello, deceased, that is possible to hold; that the defendants admitted the deed of Washington Pocatello, and Minnie Pocatello, was placed in Escrow

not to be delivered until the full amount of $3000.00 was paid to the Escrow Holder; that Washington Pocatello died, some 17 months before the property was decreed to his estate, and before the Deed was delivered, and defendants, by their pleadings admitted that there was a question whether the Deed was rightfully delivered. Plaintiffs alleged in paragraph Nine, of their Complaint that only $1000.00 had been paid to the Bank, the Escrow Holder, and pleaded specifically in said paragraph that said Deed was wrongfully delivered, and wrongfully filed of record. Defendants in their Answer, answering Paragraph Nine, of the Complaint, in paragraph 9 of their answer, pleaded as follows:

> "As answer to paragraph 9 thereof, defendants have no knowledge or information sufficient to form a belief as to the truthfulness of said allegations, and for reason thereof deny all allegations of said paragraph 9 except admit and allege that the First National Bank of Pocatello, Idaho delivered said deed, which on its face recited a consideration of $3200.00, was regularly filed for record in the Office of the County Recorder of Box Elder County, Utah, and on November 10th, 1919 at 4 P. M., was recorded in Book 15 of Deeds at page 440."

That in no place in defendant's answer, or in defendant's further answer, by way of separate defense to plaintiff's first cause of action, did defendants allege or plead that the full $3200.00 had been paid, and the Washington Pocatello Deed rightfully delivered,

yet the Trial Court by its Findings attempts to make a good title for the white men, against these Indians, and thereby take from the Indian heirs of the Estate of Washington Pocatello, a valuable property right, and give it to the respondents. In violation of the Constitutional Right, of the Appellants that their property can not be taken from them, without just compensation, or under due process of law. As guaranteed to the Appellants by the Fourteenth Amerndent to the Constitution of the United States.

The Trial Court in Finding No. 10 found:

> "That said A. I. Grover did not have knowledge that his grantors had not legal title to the undivided one-third interest in said property."

And in the same finding found that:

> "that said A. I. Grover did cause his Affidavit to be filed on or about February 10th, 1929, and that a true and correct copy of said Affidavit is marked Exhibit "E" and attached to plaintiff's complaint and that as to said Affidavit the same was regularly made in connection with the making of a loan by said A. I. Grover from the State Land Boad of Utah for $7500."

By that Finding, also, the Trial Court, not only ignored and held for naught, the Statute of the United States, heretofore quoted but attempts to make a valid title for the defendants in the case. And in support of this contention, we quote a part of the Affidavit of A. I. Grover, that was filed of Record on February 10th, 1920, just two months after he wrongfully acquired the Washington Pocatello Deed and filed the same for record.

"That I was acquainted with Washington Pocatello in his lifetime and knew his family; that he was an Indian residing at Fort Hall, Idaho; that during his lifetime he and his wife made, executed and left in escrow a warranty deed in favor of U. F. Diteman, which deed was left to be delivered to the said U. F. Diteman upon the payment of the consideration mentioned in the said escrow agreement; that subsequently the said Washington Pocatello died and his heirs appeared as contestants in the probate proceedings referred to in entry No. 12 of the abstract; that in said hearing the estate of the said Washington Pocatello was given a one-third interest in said premises and thereafter the said U. F. Diteman paid to the bank the money sufficient to procure the said warranty deed so held in escrow and procured the said deed, and subsequently conveyed his interest to proponent as shown by entry No. 16 of the abstract and that thereafter an administrator was appointed for the estate of the said Washington Pocatello and the said administrator received and accepted the money paid by the said U. F. Diteman for the waranty deed in his favor from the said Washington Pocatello and his wife.

In further support of appellants contention that Trial Courts Findings attempts to make a title for respondents we quote part of its memorandum decision.

"So far as the question of notice is concerned, the mere fact that Mr. Service made an affidavit showing the terms of the escrow cannot be held to

> mean anything in view of the fact that the very deed referred to appears to have been subsequently recorded showing a consideration of $3200.00. Nor does the affidavit of Grover as shown in the abstract, give notice of any irregularity. So the findings may show that the defendants were, in effect, innocent purchasers for value.

If that is the law, then any deed placed of record whether stolen, or how obtained, once placed of record legally passes the title which is not the law. Also, the Affidavit of A. I. Grover was placed of record for a purpose, and the Trial Court found that was part of the Abstract of Title, and the above quoted part of the Affidavit was notice to the respondents of what it contained. Such holding by the Court, denied these Indians of the equal protection of the laws, of the State of Utah, in violation of the Fourteenth Amendment of the Constitution of the United States, for the reason that the Statute Law of the State of Utah, provides:

> "Section 78-3-2. Revised Statutes of Utah, 1933, Civil Laws of Utah, 1917, Section 4900; reads as follows:
>
> "Every conveyance, or instrument in writing affecting real estate, executed, acknowledged or proved, and certified in the manner prescribed by this title and every patent to lands within this state duly executed and verified according to law, and every judgment, order or decree of any court of record in this state, or a copy thereof, required by law to be recorded in the office of the county recorder shall, from the time of filing the same

with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lienholders shall be deemed to purchase and take with notice."

This Statute of the State of Utah has already been construed, by the Supreme Court of the United States, to the effect that any recorded instrument in the State of Utah is notice to the world of all it contains.

> Calhoune Couny vs American Emigrant Co., 93 U. S. page 127; 23 L. ed. 826.

The Trial Court, denied the Appellants, the equal protection of the laws of the State of Utah, in violation of the Fourteenth Amendment to the Constituion of the United States when it held in the closing part of its Finding No. 9 as follows:

> "the Court finds that although Washington Pocatello had no title before the property was decreed to his estate, that it was unnecessary to specifically enforce the Escrow Agreement under the provisions of Section 7741, Revised Statutes of Utah, but the Bank, upon payment of the consideration aforesaid, was justified in delivering said Deed to the grantee therein."

Section 7741, Civil Laws of the State of Utah, 1917, now Section 102-11 -26 Revised Statutes of the State of Utah, 933, were and are part of the Probate Code of the State of Utah, and in both Statute Books, read identically as follows:

"Specific Performances of Decedents Contracts:

"When a person who is bound by contract in writing to convey any real estate or who is bound by contract in writing to assign, transfer or deliver any personal property, shares of capital stock, bonds or other choses in action, dies before making the conveyance, assignment, transfer or delivery; and in all cases when such decedent, if living, might be compelled to make such conveyances, assignment, transfer or delivery, the court may make a decree authorizing and directing his executor or administrator to convey such real estate, or to assign, transfer or deliver such personal property, shares of capital stock, bonds or other choses in action, to the person entitled thereto."

That Statute of the State of Utah, was enacted purposely to protect the heirs of the estates against just such loss of valuable property rights as occurred in Escrow, for the reason that there is no conveyance by a deed placed in Escrow, until there is a valid delivery of the Deed and it is a well settled rule of law that there can be no valid delivery of a Deed placed in Escrow, until there is a full performance of the escrow contract and in case where the grantor has died, the heirs would have a right to contest the delivery of the deed, if they so choose, and the Court would decide. This Statute was pleaded by the Appellants, in paragraph 21 of their complaint, and was argued and briefed before the Trial Court. This point will be again alluded to in Appellants Assignment of Error of the Decision of the Supreme Court of Utah, in this case.

That in support of another Federal Question, the Appellants alleged in their Reply to the further and Separate Defense, pleaded by the Respondents as follows:

> "that defendants had full knowledge and notice that the heirs of Washington Pocatello were full blooded Indians living under tribal relations on the Fort Hall Indian Reservation in Idaho were wards of the Government and that Washington Pocatello and Minnie Pocatello did not have any right or authority to execute the deed in the first place, for the reason that no Certificate of Compentency had been issued by the United States Government to either Washington Pocatello or Minnie Pocatello before this deed was executed by them, that said conveyance was not submitted to or approved by the Secretary of the Interior of the United States as is provided for by Act of Congress of May 27, 1902, c. Sec. 7, 32 Statute at Large, 275, also the execution of said Deed by Washington Pocatello and Minnie Pocatello and the escrow agreement entered into by them was made and all acts done by them and the said U. F. Diteman was in violation of Sec. 3. Act of Congress dated March 3, 1871, 16 Statute at Large, 570, prohibiting contracts by or with Indians who are wards of the Government except under the conditions provided for in said Act, and with the approval of the Department of, and the Secretary of the Interior."

The first part of said Act of Congress recites:

> "No agreement shall be made by a person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands. etc."

This United States Statute, was not only pleaded by the Indians, the heirs of Washington Pocatello, deceased, but it was argued and briefed to the Trial Court, and the Trial Court by its Findings and Rulings and Decree, denied the validity of said Statute as applying to the Indians in this case.

That the sweeping Findings of the Trial Court, and its decree dismissing Appellants cause of action and quieting title to the undivided one-third interest in said acres of land, denied to those Indians the protection, that the Congress of the United States enacted for the protection of Indians, from being robed of their property rights such as was done in the case at Bar.

Appellants excepted to the Trial Court's Findings of Fact, Conclusions of Law and Decree, and filed such exception with the District Court in which said case was tried and decided, in words as follows:

> "Comes now the plaintiffs and each of them, by and through counsel, and excepts to, and files this their exception to all of the Findings of Fact,

Conclusions of Law and Decree made in favor of the defendants and against the plaintiffs, in the above entitled action, as prepared by Counsel for defendants under order of the court, on the following grounds:

"That not any one of the Findings, Conclusions and Decree made in favor of the defendants and against the plaintiffs are supported by the evidence, facts and law of the case.

"That all of the Findings, Conclusions, and Decree, made in favor of the defendants and against the plaintiffs, are contrary to the evidence and facts of the case, and contrary to and not supported by the law governing any of the questions of law involved in the case." (See trans. 0134).

Said Exceptions was filed the same day that the Decree was filed.

That Appellants filed Notice of Appeal from the said District Court of Box Elder County, to the Supreme Court of the State of Utah; that appellants failed to file a proper Bill of Exceptions within the time allowed for filing same that Appellants petitioned the District Court of Box Elder County, Utah, for reliefs under Section 104-14--4, Revised Statutes of Utah, 1933, supported by affidavits of Counsel for Appellants, The Respondents through their counsel, objected to the Court granting to Appellants relief, and a hearing was had on said petition before the District Court of Box Elder County, Utah, and the said court after hearing

the petition and motion for relief, made and filed its Findings of Fact and Conclusions of Law, the said Conclusions of law reading as follows:

"1. That plaintiffs are entitled to relief from their default in not serving a proper bill of exceptions within the time fixed by law.

Dated this 11 day of March A. D., 1940.

Lewis Jones, Judge.

The said Judge of the District Court then made and entered the following Order and Decree.

"ORDER AND DECREE

"From the foregoing Findings of Fact and Conclusions of Law, signed by the court, the court hereby

"ORDERS AND DECREES; That plaintiffs be and are hereby relieved from their default in not filing and serving a proper bill of exceptions before the time for filing had expired, and that permission is hereby granted to cousel for plaintiffs to forwith serve proposed Bill of Exceptions upon counsel for defendants, and have same settled by the Court.

"Dated this 11th day of March, A. D., 1940.

"Lewis Jones, District Judge."

Said proposed Bill of Exceptions was forthwith filed

on counsel for respondents and a written acknowledgement of service was made by counsel for respondents on the 11th day of March, 1940.

That on the 15th day of April, 1940, at the time set by the District Judge for the settlement of the Bill of Exceptions in this case, and after due hearing, on the same, the District Court settled the Bill of Exceptions, the following which is a true and correct copy of the Court's settlement:

> "The foregoing bill of exceptions contains all the testimonial evidence adduced on the trial of the testimonial evidence addiced on the trial of this cause, and correctly contains the various proceedings during the trial as well as subsequent thereto, the same being true and correct, it is accordingly settled and allowed as a bill of exceptions in this cause.
>
> "Dated Brigham City, Utah, April 15th A. D., 1940.
>
> "Lewis Jones, District Judge."
> (see trans. 0361)

That there was drawn into this case and trial, the question of the validity, application, and construction of a number of Statutes of the United States, as heretofore and hereafter set forth, and the said decision ignores said Statutes, and hereby denies all the rights and privileges enacted for the protection of the Indian Appellants in the case; That said decision, denies to the appellants, the Constitutional protection of the 14th Amendment of the Constitution of the United States,

by taking from them a valuable property right without any compensation, or due process of law, and denies them the Constitutional right of the equal protection of the laws of the State of Utah and of the United States.

That the appellants perfected their Appeal from said District Court of Box Elder County, Utah, to the Supreme Court of the State of Utah, and said appeal was properly lodged in said Supreme Court of the State of Utah, the same being the highest Court in said State of Utah. The following is a true copy of said notice of appeal:

NOTICE OF APPEAL TO THE SUPREME COURT.

To the defendants, Amasa L. Clark, and Joseph E. Robinson, defendants, and to Messers Stephen, Brayton and Lowe, attorneys and Counselors of record for the defendants, Amasa L. Clark and Joseph E. Robinson and to Box Elder County, Defendant and to Walter G. Man, County Attorney of Box Elder County, Utah.

You, and each of you, please take notice:

That the above named plaintiffs, Laura Morris, Special Administratrix of the Estate of Washington Pocatello, and Minnie Pocatello, both deceased, and Lucy Pocatello Johnson and Maud Pocatello Racehorse, and Josephine Pocatello, and Ray Pocatello, heirs of the Estate of Washington Pocatello and Minnie Pocatello, deceased, the above

> named plaintiffs, hereby appeal, and by this notice does appeal to the Supreme Court of the State of Utah, from all and every part of the judgment made and entered herein, and filed on the 27th day of November, in the above entitled cause, insofar as said judgment is in favor of the defendants Amasa L. Clark and Joseph E. Robinson.
>
> This appeal is taken on questions of both law and fact and from the whole and every part thereof. (transcript 0335).

That the protection extended to Indians by the provision of the Act of Congress, heretofore quoted namely:

> Act of Congress June 30, 1834; c161, Sec. 22, 4 Stat. at Large. 735; Revised Statute Sec, 2136, U. S. Code Compact Ed, Sec 194.

follows the case throughout all courts and is as binding upon the Justices of the Supreme Court of a State as it is binding on the Judge of the District Court, and the same burden is placed by said Statute upon the white person litigant, in the Supreme Court of a State to prove that he had good and valid title to the property that the Indian claims title to.

It was admitted by the respondents and found by the Court that the Appellants, Indians in this case possessed the highest muniment of title to the interest in dispute as it is possible for any person to hold. However, notwithstanding the burden that the United States Statute placed upon the respondent, and the

duty the Statute placed upon the Supreme Court of the State of Utah, to apply the Statute in this case, respondents did on or about the 25th day of June, 1940, file a motion in the Supreme Court of the State of Utah to strike from the files in the case Appellants Bill of Exceptions. The Supreme Court of the State of Utah entertained said motion, and Noticed said Motion for hearing before said Court on the 3d day of July 1940. Three Justices of said Court, did hear respondents motion, and arguments made by counsel for both parties, and took said Motion under advisement, and said Court did on the 17th day of July, 1940, make and enter an Order in the case at Bar, striking Appellants Bill of Exception, thereby relieving the Respondents from the burden placed upon the Respondents by the said Statute of the United States to prove in all Courts that the Respondents had a superior title to the property, and that the Washington Pocatello deed, was not only a valid deed when executed, but also that there was a valid delivery of the deed after his death. In this case there were no doubts to be considered as to the validity of the Title of the Appellant, before, and at the time the deed of their father was the same as stolen by Respondent's predecessor.

That subsequent to the Court striking the Bill of Exceptions, Respondents moved to dismiss the appeal, on the ground that the Bill of Exceptions having been striken there was nothing before the Court, that the Court could consider. This motion was argued to the Court and submitted, and the Court on the 4th day of October, 1940, denied the motion to dismiss the appeal,

and subsequently set the case for hearing on its merits, upon the Judgment Roll only.

Appellants brought to the attention of the Supreme Court of the State of Utah, in their brief before argument, and by oral argument the United States Statute enacted by Congress for the protection of Indians

in all trials for the right of property, where it is shown that the Indian had a presumption of title. In this case the Indian was not relying on a presumption, but had the highest muniment of title possible to exist. Appel lants brief to the Supreme Court of Utah set forth verbatim the Act of Congress passed on June the 30th, 1834, Citing where the Statute could be found, and argued this Statute to the Supreme Court on behalf of Appellants.

The Appellants also, brought to the attention of the Supreme Court of the State of Utah by written brief and argument the contention that Washington Pocatello and Minnie Pocatello, at the time they executed the deed were Wards of the Governmnt, and incompetent under the Statutes of the United States, and that no Certificate of Competency had been issued to them, removing the restriction of incompetency, and thereby their deed was void, and cited to the Supreme Court of Utah, the following Statutes of the United States, governing contracts made with Indians where no certificate of Compentcy had been issued to them; namely:

Act of Congress, March 3, 1871, c 120, Sec. 3,

16 Statute at Large, 570. U. S. Code Compact Edition, Sec. 81.

Act of Congress, May 27th, 1902, c.888, Sec. 7, 32 Statute at Large 275. U. S. Code Compact Edition, Sec. 379.

Act of Congress, March 1, 1907, c. 2285, 34 Statute at Large. 1018. U. S. Code, Compact Edition, Sec. 405.

That the said Supreme Court of the State of Utah, ignored, and refused to apply the protection of any one of the four quoted Acts of Congress, to the Appellant Indians in this case, thereby denying to appellants the rights and privileges of said Statutes, guaranting to the Appellants, and denying to Appellants the protection that the Congress of the United States enacted purposely to protect Indians, who are Wards of the Government, from having their valuable property rights taken from them in such manner as was done in the case at Bar.

That the Supreme Court of the State of Utah is the highest Court of said State in which a dicision in this suit can be had.

That in said cause there is drawn the validity and applicability of the Statutes of the United States heretofore quoted enacted by the United States for the protection of incompetent Indian wards of the Government.

That in said cause there is drawn the Constitution-

al Right guaranteed to the Appellants by the fourteenth Amendment of the Constitution of the United States; that their valuable property rights can not be wrongfully and unlawfully taken away from them and given to another without any remuneration whatsoever, and without due process of law.

There is drawn in this cause the Constitutional Right guaranteed to the Appellants by the Fourteenth Amendment of the Constitution of the United States the equal protection of the laws of the United States and the equal protection of the laws of the State of Utah, which was denied them.

That on the 18th day of April, 1941, the Supreme Court of Utah, which is the highest court in the State of Utah rendered and filed its decision affirming the decision of the lower court, which said decision takes from these Indian, the Appellants a valuable property without any remuneration or due process of law, and in violation of their Constitutional Right guaranteed the Appellants under the Fourteenth Amendment of the Constitution of the United States; which dicision denies to the Appellants, Indians, non-residents of the State of Utah, the Constitutional Right guarateed by the Fourteenth Amendment of the Constitution of the United States, the equal protection of the laws of the United States and the State of Utah, which decision is final.

In due time, and before the time had expired to file a petition, the Appellants petitioned the Supreme Court of the State of Utah for a rehearing of said case, pointing out to the Court the reasons why Ap-

pellants believed that the decision of the Court was wrong, and worked an injustice to the Appellants, that said Court took said petition under advisement, and on the 16th day of July, 1941 denied Appellants petition for rehearing, therefore Appellants have exhausted every chance to get justice in the Courts of the State of Utah, and have no recourse left except to appeal to the Supreme Court of the United States.

That therefore, in accordance with Sec. 237 (a) of the Judicial Code, now Sec. 344, 28 United States Code Annotated, and in accordance with the Rules of the Supreme Court of the United States your petitioners respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928 was passed, to wit: under Section 237(a) of the Judicial Code, now Section 344, 28, United States Code Annotated, a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

The errors which your petitioners claim to be entitled to an appeal are more fully set out in the assignments of Errors, attached and filed herewith, persuant to rules 9 and 46 of the rules of the Supreme Court of the United States, and there is likewise attached and filed herewith a Statement as to the Jurisdiction of the Supreme Court of the United States as provided for by Rules 12 and 46 of the Rules of the Supreme Court of the United States; For convenience of the Court a true copy of the decision of the Supreme Court of the State of Utah, the Assignments of Error and the Statement as to the Jur-

isdiction of the Supreme Court of the United States are all printed and bound in one volume.

Wherefore, your petitioners prays for the allowance of an appeal from the said Supreme Court of the State of Utah, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of Utah, may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Utah, and may be sent to the Supreme Court of the United Sstats, as provided by law, and an order be made touching the security to be required of the petitioner, and that the bond for cost tendered by the petitioner be approved.

Dated this 14th day of August, 1941.

ROY L. BLACK,
Attorney for Petitioners, admitted to practice before the Supreme Court of the United States.
Residence: Pocatello, Idaho.

P. C. O'MALLEY,
Attorney for Petitioners.
Residence: Pocatello, Idaho.

In The
Supreme Court of the United States

Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, deceased.

Plaintiffs and Appellants,

vs

Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah,

Defendants and Respondents.

APPELLANT ASSIGNMENT OF ERRORS

The petitioner assigns the following errors in the record and proceedings:

1. That the State Court erred in refusing to recognize the Statute of the United States, thereby denying appellants, right, and privilege under the United States Statute. Act of Congress, June 30, 1934, c161, Sec. 22, 4 Statute at Large, 763. Revised Statutes 2126, U. S. Code Compact Edition, Sec 194. U. S. C. A. Sec. 194, and to support Appellants contention that this Statute placed the burden on Respondents, to prove they had superior title, to the property in question than the Appellants. It being conceded and found

that the Appellants are Indians, Wards of the Government.

Appellants again quote the Statute in words as follows:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

2. The state Court erred in refusing to support the Appellants contention, that it being admitted by Respondents, and found to be the fact by the Court, that Washington Pocatello. and Minnie Pocatello, both deceased, when they executed the deed in question, were Indians, wards of the Government, and therefore were incapacitated to make a valid deed, under the following Statutes of the United States; namely;

> Act of Congress, March 3d, 1871, c. 120, Sec. 3, 16 Statute at Large, 570. U. S. Code, Compact Ed. Sec. 81. 25 U. S. A. C. Sec. 81.

> Act of Congress, May 27th, 1902, c. 888, Sec. 7. 32 Statute at Large, 275. U. S. Code Compact Ed. 399. 25 U. S. A. C. Sec. 379.

> Act of Congress, March 1st, 1907, c. 2285, 34 Statute at Large. 1018. U. S. Code Compact Ed. Sec. 405. 25 U. S. A. C. Sec. 405.

And refusing to support the contention of Appellants, that the burden was on the Respondents, to prove that the Deed of Washington Pocatello, and Minnie Pocatello was a valid deed in the first place, and that there was a valid delivery of said deed. The above and foregoing Acts of Congress, having all been enacted for the protection of Indians, guaranteeing to Appellants, rights and privileges there under.

3. That the State Court, erred, when it struck the Appellants Bill of Exceptions, upon the motion of Respondents, and refused to examine the evidence submitted in the case. The refusal of the Supreme Court of the State of Utah to examine the evidence in the case to see whether the Respondents, white persons, had sustained the burden of proof, at the trial of the case, was denying to the Appellants the rights and privileges extended to Appellants by the Act of Congress, of June 30, 1934, s. 161, Sec. 22, 4 Statute at Large 763. Revised Statutes 2126. U. S. Code Compact Ed. 194., and was denying the Appellants a fair trial, and equal protection of the laws in violation of Appellants Constitutional Rights, under the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court erred in striking the Bill of Exceptions for the further reason this is a suit of equity, and in all cases of equity when the appeal is on both questions of law and fact the Supreme Court shall pass on questions of both law and fact.

Section 104-41-1, Revised Statutes of Utah, 1933 reads as follows:

> "From all final judgments from the District Courts, except in certain cases specially provided for originating in City Courts and in Juctice Courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the Disrtict Court. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeal shall also lie from final orders and decrees of the final orders and decrees of the Court in the addministration of decedents' estate and in cases of guardianship."

In a recently decided case the Supreme Court of Utah held as follows:

> "This being an equity case we are required to examine the evidence and determine the facts for ourselves. It has some times been stated that the review of an equity case under our constitution and laws is a trial de novo upon the record" Jensen vs Howell, 75 Utah, 64, 282 Pac. P. 1034 - 1938. "In an equity case, this court is authorized to review both questions of law and fact." Independent Oil and Gas Co. v Shelton et al 79 Utah 384, 6 Pac 2d, 1027, 1032.
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> Federal Land Bank of Berkley v Salt Lake Valley Sand & Gravel Co. et al. 85 Pac 2d, P 791, (decided Jan. 3d, 1939.)

4. It being conceded, and the record and proceedings showing, and the Trial Court Findings No. 8 finding that the Deed of Washington Pocatello, and Minnie

Pocatello, deceased, was placed in escrow, the State Court erred in so emphatically throughout all of the proceedings of imposing the burden on the Appellants, that they had to show by positive evidence that the deed in question was not valid as found in Findings No. 9, of the District Court, Which Finding is upheld in its entirety by the Supreme Court of the State of Utah, such finding is contrary to law and is denying to the Appellants a fair trial and the equal protection the rights and privileges of the Laws of the United States and the State of Utah as guaranteed to Appellants by the Fourteenth Amendment of the Constitution of the United States.

5. The Supreme Court of the State of Utah, erred, in the seventh paragraph of its decision, because by said paragraph, coupled with all of the rest of its decision, the Supreme Court sustained and affirmed, and upheld in its entirety, all of the District Courts Finding No. 9, which said Finding No. 9 of the District Court, placed a burden upon the Appellants so contrary to the settled principles of law, that has existed for four hundred years of English and United States Jurisprudence, and so contrary to the facts set forth in the Judgment Roll that the upholding of such Findings, would be wrong were the Appellants white persons, let alone Indians, and thereby denied to Appellants the rights and privileges granted to the Appellants by laws of the United States. So as this Finding will be before the Supreme Court of the United States, we take the liberty to quote all of said finding verbatim:

"That the plaintiffs offered no evidence at the

trial of said cause to the effect that U. F. Diteman, Grantee in said Warranty Deed on escrow with the First National Bank of Pocatello, Idaho. Himself, or with the one A. I. Grover, wrongfully, unlawfully, corruptedly and intentional, with the intent to defraud the estate of Washington Pocatello and the heirs of the Estate of Washington Pocatello, paid to said eschow holder only $1000.00 on the purchase price of $3200.00 named in said Deed and Escrow Agreement and wrongfully and unlawfully procured from said depositary the said Warranty Deed; that said plaintiffs offered no testimony to the effect that said depositary bank did unlawfully, wrongfully and contrary to the express terms and obligations of said Escrow Agreement, accept $1000.00 and deliver to said U. F. Diteman and A. I. Grover the said Deed; that the plaintiffs offered no testimony at the time of the delivery of said Deed, the said U. F. Diteman and A. I. Grover and said depositary bank, all had knowledge that Washington Pocatello was dead for more than a year previous to the delivery of said Deed and that no administrator had been appointed for said estate and that by reason of the failure to offer evidence on said points heretofore set out in this paragraph, the court finds against the same; the Court further finds that said Warranty Deed was by the First National Bank of Pocatello, Idaho, delivered to U. F. Diteman, or some person acting for him, and that said Deed which on its face recited a consideration of $3200.00 was regularly filed for record in the office of the County Recorder of Box Elder County,

Utah, on November 10, 1919, at 4:00 P. M., in Book 15 of Deeds at Page 440; that the said U. F. Diteman and A. I. Grover, or either of them, did not unlawfully, illegally or for the purpose of cheating or defrauding the Estate of Washington Pocatello and his heirs out of said property, file the said Deed for record in said Box Elder County, Utah, but that said Deed was regularly filed for record and recorded; that said A. I. Grover, by the recording of said Deed, did not attempt to take from the estate a valuable property right; that the said A. I. Grover did November, 1919, claim ownership of said lands; that said Deed was not void but was a valid Deed and passed title to the undivided one-third interest of said property to U. F. Diteman; that the depositary bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the deed was regular on its face recited the consideration of $3200.00 and from the evidence in the case the Court finds that said $3200.00 recited in the Deed was paid to said Escrow Holder and that the transaction with said Bank was not fraudulent; the court further finds that although Washington Pocatello had not title before the property was decreed to his estate, that it was unnecessary to specifically enforce the Escrow Agreement under the provisions of Section 7741, Revised Statutes of Utah, but the upon payment of the consideration aforesaid, was justified in delivering said Deed to the grantee, therein."

The Supreme Court of the State of Utah, picks from that long finding that placed the burdens on the Appellant, that the law does not in any incident, place on the plaintiff in a case suing to quiet title, under any condition, but especially where it is shown that the deed was placed in Escrow, and a valid delivery of the deed is in question, and especially in the case at Bar, where the Judgment Roll, and the Probate Proceedings in the Washington Pocatello estate shows that the valid delivery of the Deed was questionable. The Supreme Court commenting on Finding No. 9 of the Trial Court in paragraph Six of its decision says in part:

> "Upon these issues the Trial Court found in favor of the defendants and against the plaintiffs on the issue of payment **Vel non** (blackface ours) of the full consideration to the depositary before the delivery by it of the Deed, the court made the following finding:"
>
> > 'That the depositary bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of $3200.00 and from the evidence in the case the said $3200.00 was paid to said Escrow Holder and that was not fraudulent.' "

6. The Supreme Court of the State of Utah, erred, by only quoting and relying on the portion quoted by the Court of Finding No. 9, of the Trial Court, and

holds that there might be some evdience in the record that the Trial Court was alluding to when he used the words "from the evidence in the case," that might support the Finding of the Trial Court that the full sum of $3200.00 was paid to the Bank, and that the deed was validly delivered, and owing to the Bill of Exceptions having been stricken by the Court, the Supreme Court could not disturb the findings of the Trial Court, (see paragraphs 6 and 7 of decision). Appellants do not hesitate to contend this was error on the part of the Supreme Court, for the reason that Appellants believe that a reading of all of the Trial Courts Finding No. 9, that when the Trial Court used the words in Finding No. 9, "from the evidence in the case," the Trial Court was alluding to the fact that the Appellants did not prove to the satisfaction of the Trial Court, all the matters he enumerated and wrongfully charged that the Appellants failed to prove. When in fact and in law the Judgment Roll alone in the case, shows that the Appellants did offer all of the evidence sufficient to make out a complete case against the Respondents and put the burden on the Respondents to prove by positive evidence that their title was superior to the title of the Appellants, regardless of whether the Appellants were white persons or Indians. And Appellants have no hesitancy in contending that Finding No. 9, of the Trial Court unanimously sustained and affirmed by the Supreme Court, shows that the Courts of Utah, denied to Appellants the right and privilege granted to the Appellants under the United States Statute cited and the equal protection of the laws as guaranteed to appellants by the Fourteenth Amendment of the Constitution of the United States.

7. The Supreme Court of the State of Utah, erred, in the 7th paragraph of its Decision wherein it held:

> "Despite the striking of their bill of exception, appellants argue that such findings is not supported by the evidence. They contend that the admissions in defendants pleadings that Foxley, Administrator, had reported in the estate proceedings the receipt of only approximately $1,000.00 from the depositary bank and that the affidavit of the cashier of such bank herein before adverted to, setting forth the terms of the escrow was placed of record, plus the record of the Probate Proceedings in the Estate of Washington Pocatello — of which though contained in the Bill of Exceptions they contend we must never-the-less take judicial notice — it is conclusively shown that the escrow deed was delivered without performance of the condition. With this contention we don't agree. The report was never heard or passed on by the Probate Court. We can not say it necessarily spoke the truth with respect to the amount received by the administrator from the bank, nor that the report establishes that the bank delivered to him the total amount paid by the grantee in the deed, especially since the striken bill may contain evidence which precludes any inference what ever which might possible be drawn therefrom."

By this finding the Supreme Court of the State of Utah, not only refuses to take judicial notice of the probate proceedings in the District Court in this case which is a part of the case, but the Supreme Court says

that the report of the administrator to the District Court of Box Elder County, Utah, in the estate of Washington Pocatello, deceased,—which estate is involved in this suit,— "could not be said to necessarily tell the truth, as the report of the administrator was never passed on by the probate court." The Estate of Washington Pocatello, deceased, has stood unattended to in the District Court of Box Elder County for over 20 years, and then the Supreme Court of the State of Utah says the report of the Administrator, can't be considered, because it might not speak the truth with respect to the amount received by the administrator from the bank, nor that the bank delivered to him the total amount paid by the grantee in the deed. The report of the Administrator to the District Court of Box Elder County, Utah, is certainly strong prima facie evidence of what they contain, and is sufficient in this case to support the contention of Appellants that only $1000.00 was paid the Escrow Holder for the deed and to put the burden on the respondents to prove a valid delivery of the Deed, if the Appellants were white persons, let alone Indians, such finding by the Supreme Court is denying the Appellants equal protection of the laws, of the United States and the State of Utah.

8. The Supreme Court of the State of Utah erred in the 8th paragraph of its Decision, wherein it held against the contention of Appellants that Washington Pocatello having been dead some 17 months before the Deed was delivered that there could not be a valid delivery even if the full consideration was paid. The State of Utah has a Statute in its Probate Code Pertaining to Specific Performances of Decedents Contracts, which

was Section 7741, of Revised Statutes of Utah, which was in force at the time this deed was obtained and filed for record, and is now Section 102-11-26, which Statute is quoted verbatim in Appellants Petition for Appeal at page 14 of said petition. Furthermore the Court erred in applying the rule quoted by the Court from page 878 of 21 C. J. as found in paragraph 8 of the decision for the reason that rule is applicable only when it is shown there was a full compliance with all of the escrow obligations and in furtherance of Justice, and the rule laid down in C. J. does not over-ride the Statutes of the State of Utah, nor, does it permit the Court to simply presume there was full performance of the contract.

9. The Supreme Court of the State of Utah, erred, in paragraph 9 of its decision, wherein it held against the contention of Appellants, that the District Court decree in the Estate of Yaotes Owa, created in the heirs of Washington Pocatello, the highest muniment of title there exists, and that the same can only be taken from them by their own act, on a judgment of a court having proper jurisdiction. The Court holding that the deed being in escrow, that when it was delivered the doctrine of relation back, cut the heirs out. This holding by the Court is error, in the first place relation back of a deed from the time of delivery to the time of execution is not a doctrine in law, it is only a fiction in law, and applied only when it is shown and proven that there is a full performance of all obligations, and it is in the furtherance of Justice, that the fiction of relation back is invoked, and when Courts do invoke it, especially when it deprives heirs of their inheritance,

it is only done when the party seeking the relation back proves to the Court that every obligation on the part of the grantee to perform was fully performed and no injustice is done by invoking the fiction. The fiction of relation back can not be idly applied by the Courts to take property away from one person, a non-resident of the state and give it to another, a resident of the courts state.

10. The Supreme Court of the State of Utah further erred in the said paragraph 9 of its decision wherein it said:

> "Should Washington Pocatello have lived until the date of the decree of distribution of the Estate of Yaotes Owa, and the court have then decreed to him the undivided one-third interest, the conditions of the escrow agreement having in the meantime been fully complied with by the grantee in the escrow deed and the deed delivered, the decree of the Court would merely confirm the title warranted by the deed. The same result is effected by deliver upon performance of the conditions after the grantors death."

Such holding is error, for many reasons, first the Court just presumed contrary to the record in this case that there was a performance of the conditions of the Escrow. After a person dies, who has authority to say whether the conditions are fully performed or not? can the grantee and the Escrow Holder decide between themselves? have not the heirs the right to object if they believe te Escrow contract was not just?

Such holding, is so contrary to the Law of the State of Utah, that it is denying the Appellants in this case equal protection of the law of Utah. Section 101,-4-2, of the Revised Laws of the State of Utah, 1933, which said law was Section 6405, Civil laws of Utah, 1917, and was in force when Washington Pocatello died, and when this deed was delivered reads as follows:

> "Property of Interstate Passes to Heirs Subject to Probate Proceedings.
>
> "The property, both real and personal, of one who died without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the Court for the purpose of administration."

11. The Supreme Court of the State of Utah, erred, in the 11th paragraph of its decision, as such holding is contrary to and ignoring the Statutes of the United States heretofore cited on page..... of Appellants Petition for Appeal and set forth in Appellants Statement of Jurisdiction, wherein it held in said paragraph:

> "As far as revealed by the judgment roll any other conditions prescribed by law requisite to a valid contract by such Indians may have been—if at all applicable—complied with."

Under the Act of Congress, June 30, 1934, c 161, Sec. 22, 4 Statute at Large 763, R. S. Sec. 2126, heretofore cited and printed vertabim on page 27 of Appellants

Petition for Appeal. It was the duty of the Supreme Court to examine all the evidence in the case before it made such ruling, and such ruling as made by the Supreme Court denied Appellants their rights and privileges guaranteed by said United States Statute.

12. The Supreme Court erred, in the last paragraph of its decision, where the Court said:

> "In view of our holding that we may not on the record before us disturb the finding of the Trial Court that there was a full compliance with the conditions of the escrow before delivery of the deed to the grantee therein."

The Supreme Court of the State of Utah should have disturbed the findings of the Trial Court, and reversed the decision of the Trial Court.

13. The Supreme Court of Utah, erred, in affirming the judgment of the District Court.

That by such affirmation the Supreme Court, took from the Appellants a valuable property right and gave it to white persons, and denied Appellants the equal protection of the Laws of the United States and of the State of Utah, thereby depriving Appellants of their Constitutional Rights under the Fourteenth Amendment of the Constitution of the United States, and of their rights and privileges under the United States Statute.

Wherefore, on account of the errors hereinbefore assigned, petitioners pray that the said judgment of the Supreme Court of the State of Utah, dated and filed

on the 18th day of April, 1941, in the above entitled cause, be reversed, and judgment entered in favor of the Appellants.

Dated this 14th day of August, 1941.

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